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NOT TO BE PUBLISHED

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

In re DERICK J., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. DERICK J., Defendant and Appellant.	E029160 (Super.Ct.No. J168620) OPINION

APPEAL from the Superior Court of San Bernardino County. John P. Wade, Judge. Affirmed.

Michael R. Totaro, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Garrett Beaumont, Supervising Deputy Attorney General, and Elizabeth A. Hartwig, Deputy Attorney General, for Plaintiff and Respondent.

1. Introduction

Minor Derick J. appeals from a judgment following a true finding that he committed an arson of an inhabited dwelling. On appeal, minor claims the prosecutor committed misconduct by asking a witness to respond to damaging, but groundless facts and to testify concerning another witness' veracity. Alternatively, minor claims his trial counsel provided ineffective assistance in failing to object to the prosecutor's questions. Minor also claims that insufficient evidence supported the intent element of his arson conviction.

We conclude that no prejudicial error resulted from the prosecutor's questions. We further conclude that the circumstantial evidence of minor's intent provided substantial evidence to support his arson conviction. Therefore, we affirm the trial court's judgment.

2. Factual and Procedural History

On August 21, 2000, minor lived with his mother, Shirley G., in an apartment in San Bernardino. At approximately 6:40 a.m., Shirley left her apartment, crossed the street, and waited for her ride to work.

About 10 minutes later, Monica H. arrived at that location and picked up Shirley. As she drove away, Monica noticed smoke coming from Shirley's apartment. Monica turned around and drove back to the apartment. At that point, Monica observed minor running out of the building with something in his hands. Later, as she was leaving, Monica saw minor and gave him Shirley's lunch box. According to Monica, both Shirley and her son appeared to be upset.

When fire captain Mark Graham arrived at Shirley's apartment, he noticed a large amount of smoke coming from the apartment. Although Shirley informed Graham that the

fire started in the kitchen, Graham did not observe any active flames in the kitchen. Rather, for the most part, the fire was confined to the living room. After Graham extinguished the fire, he called the arson investigators.

Based on his observations of the damage caused by the fire, arson investigator John Payan noticed a pattern indicating that the fire originated from the living room and exited out through the front door. The fire from the living room also charred some of the wood cabinets in the kitchen. Payan noticed low burn damage, which indicated a point of origin, where the sofa was located. He recognized a "V" pattern, which was another indication of a point of origin, near the entertainment center. Also in the living room, Payan noticed low burn damage by a chair and a nearby table. An arson accelerant K-9 dog detected flammable gases on the entertainment center, the chair, and the table. Shirley explained that she kept lighter fluid and other household supplies in her kitchen cabinet.

Payan concluded that the fire started in the living room. He concluded that the fire was set intentionally and at multiple locations near the front door and the entertainment center. He noted that the electrical outlets were not a factor in the fire.

Another arson investigator, Grant Hubbell, confirmed Payan's observations. Hubbell also concluded that the fire was the result of arson.

Minor informed Payan that he heard the alarm while he was asleep in his bedroom. When he exited his bedroom, he noticed a small fire coming from the stove in the kitchen. Minor also explained that, because he was unable to extinguish the fire, he left the apartment through the front door.

Although minor denied smoking, Payan found lighters in minor's bedroom and on his person. Minor also denied any prior police contact despite his previous encounters with law enforcement and the juvenile court based on a misdemeanor battery offense earlier in the year.

Shirley was planning to move because she was behind in paying rent. Although minor told Payan that he was unaware of the possible eviction proceedings, he noticed certain packed items in the living room.

Shirley's neighbor, Merick H., often overheard Shirley and minor screaming at each other. On August 24th, about one or one-half hour before the fire, Holt observed minor outside of his front door and heard him yelling back toward the apartment, "You're gonna be sick and fuckin' tired of me if you keep messing with me."

After his interviews with the witnesses, Payan placed minor under arrest.

In a petition filed under Welfare and Institutions Code section 602, the district attorney alleged that minor committed an arson of an inhabited structure within the meaning of Penal Code section 451, subdivision (b).[1]

After a contested dispositional hearing, the trial court declared minor a ward of the court and found true the arson allegation.

3. Prosecutorial Misconduct

Minor claims the prosecutor committed misconduct by asking a question that implied a damaging fact without reasonable grounds for anticipating the confirmation of

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[1] All further statutory references will be to the Penal Code unless otherwise stated.

[footnote continued on next page]

that fact. Minor also claims the prosecutor committed misconduct by asking a witness to testify concerning another witness' veracity. In anticipating the People's waiver argument, minor claims that his trial counsel provided ineffective assistance in failing to object to the prosecutor's questions.

During one instance, the prosecutor asked Monica about her statement to Payan concerning minor's demeanor after the fire.

"Q And was [Shirley] upset?

"A Yeah, she was crying. She was upset.

"Q How about Derick?

"A Both of them were upset. They were hugging at one point and --

"Q Was he crying?

"A I don't remember.

"Q Okay. So you told Investigator Payan that he wasn't crying and he didn't appear upset. Is that accurate?

"A Nope. I did not say that.

"Q You never said that to Investigator Payan?

"A No, I did not.

"Q So you made that up?

"A I didn't say that. I said he looked like he was upset. I never said that he wasn't crying because I don't remember."

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During redirect examination, the prosecutor again questioned Monica concerning minor's demeanor.

"Q I just want to make it clear. You told Investigator Payan that [Shirley] was crying and hugging her son while [minor] appeared to remain calm and not crying or upset?

"A I didn't say that. I said that she was crying and hugging her son and he looked like he was upset.

"Q Was he facing you?

"A No.

"Q So how do you know that he was upset?

"A She wasn't facing me either but she was upset.

"Q So this is an incorrect statement?

"A Uh-huh.

"Q So this investigator just put this in for --

"[Defense counsel]: Objection, argumentative.

"The Court: Overruled.

"Q (By [the prosecutor]:) Why would he put this down if it weren't true?

"A I don't know.

"The Court: That is argumentative. Sustained.

"[Prosecutor]: No further questions."

A prosecutor commits misconduct, under the federal constitutional standard, when he engages in a pattern of conduct that is so egregious that it deprives the defendant of a fair

trial.[2] Under the state standard, a prosecutor's behavior amounts to misconduct when he applies deceptive or reprehensible methods to sway the court or the jury.[3] In particular, "[i]t is misconduct for a prosecutor to ask a witness a question that implies a fact harmful to a defendant unless the prosecutor has reasonable grounds to anticipate an answer confirming the implied fact or is prepared to prove the fact by other means. [Citation.]"[4] However, a defendant waives his prosecutorial misconduct claim by failing to assert a timely and specific objection.[5]

Here, during both the prosecutor's direct and redirect examination, minor failed to make an objection on the ground of prosecutorial misconduct. He has therefore waived his right to raise this claim on appeal.

As stated above, minor alternatively claims that his trial counsel provided ineffective assistance in failing to object to the prosecutor's questions. Minor argues that counsel's failings were prejudicial because Monica's observations of his distressed demeanor after the fire were critical to his defense.

To establish constitutionally ineffective representation, minor must show both that trial counsel's performance fell below the standard of a diligent and reasonably competent

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[2] *People v. Smithey* (1999) 20 Cal.4th 936, 960.

[3] *People v. Smithey, supra*, 20 Cal.4th at page 960.

[4] *People v. Price* (1991) 1 Cal.4th 324, 481; see also *People v. Earp* (1999) 20 Cal.4th 826, 860-861.

attorney and that it is reasonably probable that a more favorable outcome would have resulted absent counsel's deficient performance.[6] "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'"[7] Throughout the inquiry, there is a strong presumption that an attorney's performance falls within the wide range of reasonable professional conduct.[8] A reviewing court should not second-guess trial counsel's reasonable tactical decisions.[9]

Our review of the record reveals that defense counsel's performance did not amount to ineffective assistance. The prosecutor simply questioned Monica concerning the accuracy of her own statements. She impeached Monica with her prior statements to the arson investigator after the fire. At one point, although Monica described minor's appearance, she admitted that he was not even facing her. Monica also admitted that she could not recall whether minor was crying. Thus, the prosecutor was able to confirm that none of the witnesses observed or remembered minor crying after the fire. Based on

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[5] *People v. Crittenden* (1994) 9 Cal.4th 83, 146; *People v. Price*, *supra*, 1 Cal.4th at page 481.

[6] *People v. Lewis* (1990) 50 Cal.3d 262, 288, citing *Strickland v. Washington* (1984) 466 U.S. 668, 687-696; *People v. Fosselman* (1983) 33 Cal.3d 572, 584; *People v. Pope* (1979) 23 Cal.3d 412, 425.

[7] *People v. Scott* (1997) 15 Cal.4th 1188, 1211-1212, quoting *Strickland v. Washington*, *supra*, 466 U.S. at page 694.

[8] *People v. Lewis*, *supra*, 50 Cal.3d at page 288.

[9] *People v. Scott*, *supra*, 15 Cal.4th at page 1212.

Payan's report, the prosecutor had reasonable grounds to anticipate clarification concerning minor's behavior or appearance. Under these circumstances, there was no need for counsel to raise an objection. Also, as to the second alleged instance of misconduct, minor's counsel objected on other grounds and the court subsequently agreed that the prosecutor's question was inappropriate.

Moreover, there was no prejudice. Evidence of minor's demeanor did not play a critical role in his case. In fact, as noted by the People, neither the defense nor the prosecution relied on minor's demeanor during their closing arguments. Instead, other evidence, including the results of the arson investigation, minor's presence at the scene, the lighter found on his person, and minor's inconsistent description of the fire, amply supported the true finding. It was therefore not reasonably probable that a different outcome would have resulted if counsel objected to the prosecutor's questions concerning minor's demeanor.

We conclude that minor's trial attorney did not provide ineffective assistance.

4. Insufficient Evidence of Arson

Minor claims that insufficient evidence supported the intent element of the crime of arson. Specifically, minor argues that, assuming he started the fire, he acted recklessly, rather than willfully and maliciously. Minor also argues that the evidence supports a finding that he merely attempted to set fire to Shirley's personal property, rather than the apartment itself. Minor therefore claims that, while he may have been guilty of recklessly setting a fire in violation of section 452, his conduct did not amount to arson as described in section 451.

In reviewing a claim of insufficient evidence, we apply the substantial evidence test.[10] We consider the entire record in the light most favorable to the judgment and determine whether a rational trier of fact could have found guilt based on evidence that is reasonable, credible, and of solid value and any inferences reasonably drawn from such evidence.[11] We apply the same standard to a conviction that rests primarily on circumstantial evidence.[12] "Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.] '"If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citation.]"' [Citation.]"[13]

In applying this standard, we conclude that substantial evidence supported the court's true finding on the arson allegation.

"A person is guilty of arson when he or she willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels, or procures the burning of, any

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[10] *People v. Kraft* (2000) 23 Cal.4th 978, 1053.

[11] *People v. Kraft, supra*, 23 Cal.4th at page 1053.

[12] *People v. Kraft, supra*, 23 Cal.4th at page 1053.

[13] *People v. Kraft, supra*, 23 Cal.4th at pages 1053-1054.

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structure, forest land, or property."[14] As defined in section 7, subdivision 1, "willfully" means a purpose or willingness to commit the act or make the omission. The term "maliciously," as used in section 451, "imports a wish to vex, defraud, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law."[15] Arson is a general intent crime that requires an ". . . intent to willfully commit the act of setting on fire under such circumstances that the direct, natural, and highly probable consequences would be the burning of the relevant structure or property."[16] Arson does not require a specific intent to cause the resulting harm—i.e., the burning of the structure.[17]

In this case, there was substantial evidence that minor willfully and maliciously set the apartment on fire. A neighbor informed Payan that, about 30 minutes before the fire, she noticed minor outside of the apartment yelling to someone inside. She specifically heard him yelling: "You're gonna be sick and fuckin' tired of me if you keep messing with

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[14] Section 451.

[15] Section 450.

[16] *People v. Atkins* (2001) 25 Cal.4th 76, 89; see also *People v. Fry* (1993) 19 Cal.App.4th 1334, 1339.

[17] *People v. Atkins*, *supra*, 25 Cal.4th at page 86; see also *People v. Lee* (1994) 28 Cal.App.4th 659, 664; *People v. Fry*, *supra*, 19 Cal.App.4th at page 1339; *People v. Glover* (1991) 233 Cal.App.3d 1476, 1483.

me." This evidence supports the prosecution's theory that minor intentionally set the apartment on fire because he was angry with his mother.

Moreover, the evidence of the damage caused by the fire supported the court's true finding. Based on his observations, Payan concluded that the fire originated from four different locations, including the sofa and the entertainment center. Despite minor's claim that the evidence supported that he simply attempted to set fire to Shirley's personal property, it can reasonably be inferred that, from minor's conduct of setting fire to multiple objects in the living room, he used these objects as a torch to set fire to the entire apartment.[18] Moreover, there is no requirement that minor intended to burn the apartment, so long as he intended to commit the act of setting the objects on fire under circumstances that naturally and likely would cause the burning of the apartment.[19] Undoubtedly, the burning of the apartment was a highly probable consequence of setting fire to flammable objects, including the living room sofa.

Minor's inconsistent account of the fire also supported the court's finding. Minor told Payan that he observed a small fire coming from the stove in the kitchen. Payan, however, concluded that the fire did not start in the kitchen. He explained that a pot located on the stove had no obvious damage. A glass object located immediately next to the stove was also unaffected by the fire. While some of the kitchen cabinets were charred by the

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[18] See *People v. Schwartz* (1992) 2 Cal.App.4th 1319, 1323.

[19] *People v. Atkins*, *supra*, 25 Cal.4th at page 89; see also *People v. Fry*, *supra*, 19 Cal.App.4th at page 1339.

active fire in the living room, none of the evidence supported minor's description of the fire.

Minor argues that the limited time frame in which he completed the alleged acts indicated that he acted recklessly, rather than intentionally.[20] Minor's argument is not sound. The conclusion that minor acted recklessly does not follow from the premise that he had a limited amount of time to get out of bed, start the fires, and run to a neighbor's house. Rather, his ability to start the multiple fires within a limited time frame supported the court's finding that he acted with purpose and malice within the meaning of section 451. Nevertheless, even if the evidence may be reconciled with a finding that minor acted recklessly, reversal is not warranted if substantial evidence supported the court's finding.[21]

For the forgoing reasons, we conclude that substantial evidence supported that minor willfully and maliciously set fire to the apartment.

5. Disposition

We affirm.

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s/Gaut
J.

We concur:
s/Hollenhorst
Acting P. J.
s/Ward
J.

[20] See section 450, subdivision (f).

[21] *People v. Kraft*, *supra*, 23 Cal.4th at pages 1053-1054.